

MICHIGAN SUPREME COURT

PUBLIC HEARING

MAY 23, 2006

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**CHIEF JUSTICE TAYLOR:** Good morning. Welcome to the public hearing. The manner in which this will be conducted is that each speaker gets three minutes. There will be a light that will go off there that will tell you when your three minutes are up and we'd like you to bring it to a close at that point. The first item is the Inactive Asbestos Docket, matter 2003-47. The first speaker is James Bedortha.

**ITEM 1: 2003-47 – Inactive Asbestos Docket**

**MR. BEDORTHA:** Good morning.

**CHIEF JUSTICE TAYLOR:** Morning.

**MR. BEDORTHA:** May it please the Court. My name is James Bedortha. I'm from the law firm of Goldberg, Persky & White. We have offices up in Saginaw and down in Allen Park. You may recall that I was here before two and a half years ago on the same issue generally and that was a proposed administrative order that would address the way in which asbestos cases are being handled in this state. At that time you were told by the proponents, by the petitioners, that there was a crisis in this state. You were told that if there was not a crisis now there would certainly be a crisis very soon. This is like déjà vu all over again. There still is no crisis. Cases filed are being disposed of by the trial judges eighty-five percent of the time within two years. Most of the cases, one thing that is different from two and a half years ago to today – most of the cases are now filed in Wayne County. And those that are not filed in Wayne County adopt the Wayne County Circuit Court Case Management Order that the plaintiffs, the defendants, and the court down in Wayne County came up with. So the sky was not falling two and a half years ago; the sky is not falling today. Two and a half years ago I urged members of the Court that this was clearly a legislative matter. This was policy decisions; this was deciding whether or not a cause of action, a meaningful cause of action, would exist. Well today, I'm pretty sure it's a legislative issue. Yesterday, I testified before the House Tort Reform Committee, and they voted a bill imposing medical criteria on asbestos victims out of committee. Three weeks ago, I testified before the Senate Judiciary Committee. They're considering an identical bill imposing medical criteria. While we don't agree with the bills, we agree that the process is legislative in nature. They took testimony. They took

evidence. They had doctors speak. They had lawyers speak. And they're pretty sure it's a legislative matter, too. They've got it both before the Senate and before the House. I'm not sure – I can't conceive of what would happen if they pass legislation and if you adopted either alternative A or B. I think it would raise a lot of eyebrows nationally as to what is happening in Michigan when the Supreme Court and the Legislature are competing, if you will, with respect to asbestos litigation. I'll end where I began. There is no crisis. A trial judge in Wayne County, Judge Colombo, he's no fan of noncancerous asbestos cases. He's no fan of me or my firm for filing them. But the procedures that he has put in place that we have agreed to with the defendants on the steering committee, have resulted in a time period of two years from filing the disposition in eighty-five percent of the cases. Thank you, your honor.

**CHIEF JUSTICE TAYLOR:** Thank you, Mr. Bedortha. Michael B. Serling.

**MR. SERLING:** Good morning Chief Justice and Justices of the Supreme Court. My name is Michael Serling and I've been an attorney in Michigan since 1970, with offices currently in Birmingham, Michigan with an office in Allen Park as well. Thirty-one years ago when I filed the first mesothelioma case, cancer case in Michigan, I was a young lawyer developing a specialty, but swirling around the whole bar at that time and the citizens of Michigan was the issue of automobile negligence cases. And at that time after a lot of self-searching and negotiations, the Legislature passed the no-fault bill which we all know and lived with for thirty years. That was an issue that was fully debated in the Legislature with all of the safeguards that our forefathers envisioned would take place. Not all of us are – not everybody's happy with that law, but it came from the Legislature. Two years and four months ago we were before this Court and at that time there were several pronouncements from the bench, not only with prior case holdings, but even from the bench on that day Justice Taylor you asked why wouldn't this be something more appropriate for the Legislature? Is there any effort underway? Then there was not; but now there is. And for the Court's information, there has been activity around the country since the last time we were here. But to my knowledge it has all come from state legislatures. Now our neighbors to the south, Ohio, passed a medical criteria bill, and there was an issue of whether there was a crisis there. In Ohio they had forty-eight thousand cases - forty thousand cases in Cleveland alone, and in Michigan today we have about 2,500 cases. At the time we were here last, there were 1,000 cases outside of Wayne County. Today there are 300. So we don't see a burgeoning of asbestos cases in our state, and I think there's reasons for it. First of all, Michigan has had extensive tort reform. The bills that were passed in the 90s have done away with joint and several liability, and it created caps and also the case management order which Judge Colombo and the defense and plaintiff's bar have fashioned which has evolved over thirty years.

Those two elements have filtered out frivolous cases in my opinion in asbestos litigation, and that's why we don't have 40,000 or 10,000 cases in Michigan. Places where dockets were instituted were places that had significantly high numbers of asbestos cases. I think that the Court will read much criticism by Michigan doctors of the standards that were employed by the American Bar Association. I think the Court should take note of our Michigan doctors from our three great universities that have strongly criticized the ABA standard. And I think that the Court should note that asbestosis cases, although they are not as tragic as a mesothelioma cancer case, --

**CHIEF JUSTICE TAYLOR:** Mr. Serling, your time has expired. Thank you very much.

**MR. SERLING:** are very serious cases.

**CHIEF JUSTICE TAYLOR:** Thank you.

**MR. SERLING:** Thank you.

**CHIEF JUSTICE TAYLOR:** Patrick Gleason.

**MR. GLEASON:** Chief Justice Taylor, Justices of this Supreme Court. My name is Patrick "Shorty" Gleason. I'm president of the Michigan State Buildings Trade Council which represents over 100,000 men and women in the construction industry. I'm here today very humbled and with – thankful for the opportunity to speak on behalf of working class men and women. I would like to start out by referring to a year, the year was 1974, is when the construction industry changed a great deal. Then Governor Milliken signed into law the MIOSHA standards. The time period that we're talking about here how our former members were infected with this serious disease was twenty – thirty years prior to 1974. And it's imperative that you have to understand that when men and women built this great state in the early 50s and 60s you have to picture that the industrial boom here in the state of Michigan with the steel mills, the powerhouses, the chemical plants, the auto factories, all those were being built during that time period, long before there was any protection whatsoever for their well being not only for safety but for health reasons. In building these facilities which is one small part of it, each and every year, in fact this weekend, used to mark a very – this coming weekend, used to mark a very important time period for the building tradesmen. We used to go into these plants whether it was changing the turbines, the boilers and powerhouses, rebuilding the blast furnaces, or putting in a brand new conveyor system in the auto plants. These facilities used to shut down Memorial weekend and be closed all the way just about to Labor Day weekend for the purposes of changeovers. And you have to understand that they went to work.

They fulfilled their obligations of their employees – to their employers. They were a real credit to the society. Many of these cases in question now are all – are veterans as well. They went to work in some real adverse conditions. And if I was to leave you with one thought, the thought would be this, there is a lot of things wrong in society today but the cases that are in question, in my opinion, are real benchmarks for all of us to follow. Because these men and women went to work, they were loyal to the employers, and they didn't contract this unfortunate disease by merely walking by these plants. They dealt with it day in and day out. They were committed to their employer. They were committed to the fact that if that employer didn't turn a buck, they didn't have a job. They were very dedicated individuals. If as much thought would have been put into this process thirty-forty years ago when this first come about that it was a serious health issue --

**CHIEF JUSTICE TAYLOR:** Mr. Gleason,

**MR. GLEASON:** we wouldn't have this (inaudible)

**CHIEF JUSTICE TAYLOR:** your time has expired. Thank you.

**JUSTICE KELLY:** I have a question Mr. Gleason. Now sir, is it your position that we should or should not establish an inactive docket for asbestos related diseases?

**MR. GLEASON:** We should not. We should let the legislation process follow its course.

**JUSTICE KELLY:** Thank you.

**MR. GLEASON:** I have all the faith and confidence in the judges in this state that they'll make the right decisions, and I feel very confident in the legal system that we have today that justice will prevail.

**JUSTICE MARKMAN:** Mr. Gleason, I understand the argument that maybe a solution ought to come from the Legislature instead of this Court, but is there something in the alternatives that this Court has set forth that cause you to believe that we would diminish any kind of protection for workers who have been exposed to this?

**MR. GLEASON:** My perspective just as a layman, thirty-five years in the construction industry, it's very critical to me that you make the decision that they're afforded the rights to have their time in court. Not impede their due process, in my opinion, if you can understand that in layman's terms.

**JUSTICE MARKMAN:** Do you see the alternative somehow denying individuals their day in court?

**MR. GLEASON:** That's what my concern is. There again, these individuals – they didn't contract the disease by not being a credit to society. The only way they contradicted the disease was being dedicated employees to the employer. It was – it's very difficult, I guess, maybe to put it into real terms, but you have to understand that during this process when all this was going on, there was no personal protection for these individuals whatsoever.

**CHIEF JUSTICE TAYLOR:** Thank you, sir.

**MR. GLEASON:** They went to work everyday. Thank you.

**CHIEF JUSTICE TAYLOR:** Thank you very much. To clarify for you when the red light begins blinking, that means your three minutes are up in case there's a confusion there. Robert Filiatrault.

**MR FILIATRAULT:** Mr. Chief Justice, Associate Justices, and may it please the Court. My name is Robert Filiatrault. I'm a member of the faculty of Michigan State University College of Law, and I come before this honorable Court today to speak in opposition to the proposed administrative order. As has already been brought to this Court's attention, I think there is a substantial, indeed overwhelming, majority of people who feel that this maybe a solution in search of a problem. When this Court last addressed this some two years ago, I submit to you that the calendar was, if you will, more clogged with these kinds of cases than they are today. As was mentioned by an earlier speaker, we have the State of Ohio to our south that has in excess of 43,000 of these cases and they have responded. But how did they respond? They responded with a legislative solution, not an administrative order, excuse me an administrative order or court rule. This brings me to my second point dealing with the concept of judicial legislation. I know under the proposal you are adopting more or less the ABA standard. That ABA standard is not universally recognized. I'm confident that you will hear today from medical professionals who do not agree with the standard that is put into this legislation. And to that regard, I think it demonstrates that we're dealing with policy that more appropriately lays with the Legislature.

**JUSTICE CORRIGAN:** Mr. Filiatrault?

**MR. FILIATRAULT:** Yes.

**JUSTICE CORRIGAN:** In your view, sir, is it appropriate to bundle nonserious with serious cases for settlement purposes such as being done in the current docket scheme as I understand it?

**MR. FILIATRAULT:** I have no problem at all with what has occurred in the Third Circuit under the auspices of (inaudible) --

**JUSTICE CORRIGAN:** You think that the serious and the nonserious should be bundled together?

**MR. FILIATRAULT:** Yes. I think they're all the --

**JUSTICE CORRIGAN:** Why?

**MR. FILIATRAULT:** Because they are the same cases. If I may turn to my third point it deals, I think, with an access to judgment question. Access to judgment, I think, has been so used that perhaps it's sometimes overused and its meaning forgotten. But I grant you they are alike. Indeed, your honor, this month's state journal has substantial - addressing the idea of access to justice.

**JUSTICE YOUNG:** How does bundling, or the prevention of bundling, affect -- leaving aside the inactive and active docket concept, how does the concept of antibundling jeopardize anyone's access to the courts?

**MR. FILIATRAULT:** Because, your honor, under the proposed administrative order it requires a plaintiff, in effect, to prove his case twice once to get off an inactive docket and on an active docket.

**JUSTICE YOUNG:** No, you are confusing -- I want you to be very clear on this. The idea is that bundling involves the leverage of a serious, a cancer case, with the nonserious, the ones that where cancer is not manifested, and using the serious case in order to leverage settlement of the nonserious cases. Without putting any of these cases on an inactive docket, Justice Corrigan was asking you to address why an antibundling provision in anyway affects the access to justice of a plaintiff.

**MR. FILIATRAULT:** In that case, your honor, then I -- I apologize for misunderstanding the question, because if this administrative order is thought to be an antibundling provision, then I apologize for that kind of misunderstanding.

**JUSTICE YOUNG:** Well --

**JUSTICE CORRIGAN:** So you oppose bundling?

**MR. FILIATRAULT:** I want to be clear here. If the design of this proposed administrative order is to provide for antibundling as the Court has addressed it --

**JUSTICE CORRIGAN:** Then you --

**MR. FILIATRAULT:** Then I --

**JUSTICE CORRIGAN:** That's fine -- and you support that as being within the Court's powers of organizing the docket.

**MR. FILIATRAULT:** In terms -- might I ask the Court's indulgence for its definition of what you mean by antibundling -- or bundling versus (inaudible) --

**JUSTICE YOUNG:** Just the concept of precluding the trial judge or the parties from using the leverage of a serious case to compel settlement of less -- of the nonserious cases.

**MR. FILIATRAULT:** I think conceptually I'm probably opposed to one using leverage in that fashion.

**JUSTICE YOUNG:** Judge Colombo said when we asked him about that he said I couldn't settle the nonserious cases without using the leverage of a serious case.

**MR. FILIATRAULT:** Then, its -- to my way of looking at it that might be pitting, if you will, one plaintiff against another. And I do believe that that would be inappropriate. But what I do believe --

**JUSTICE YOUNG:** It might explain why all across the country the funds are being exhausted for nonserious claims while the serious claims -- claimants are going without.

**MR. FILIATRAULT:** If I may quarrel with the Court's description, I don't think any lawyer has a nonserious case. Every plaintiff's case is serious. If you don't believe me, ask every plaintiff.

**JUSTICE MARKMAN:** Well opposition to bundling doesn't say any case is serious or unserious, it simply says that each case has got to stand on its own merits. Opposition to bundling, again, doesn't put cases in categories and say this is the serious category and this is the nonserious category; it simply requires each case to stand on its own merits.

**MR. FILIATRAULT:** I have no problem with having cases stand on their own merits.

**JUSTICE KELLY:** So is your position that if this Court were to pass a rule that directed judges that they could not bundle cases that would be sufficient?

**MR. FILIATRAULT:** Yes, yes. I think that would be sufficient. I think we also have to talk in terms of the realities between counsel who have multiple cases between themselves. I am sure, in all areas of litigation, there is this "bundling," but I submit for a court to adopt a provision that in effect, I think, creates both first-class and second-class plaintiffs and I use those words intentionally. We are called in tier 1 and tier 2.

**CHIEF JUSTICE TAYLOR:** Sir, thank you very much.

**MR. FILIATRAULT:** Thank you, your honor.

**CHIEF JUSTICE TAYLOR:** Margaret Holman Jensen.

**MS. JENSEN:** Good morning, Justices. And I want to thank you for this opportunity to say a few words. I had prepared some comments last night and frankly I found myself bored myself, so, I'm going to try to spare you. One of the things I'd like to say is that in response to some of the questions that I'm hearing, the proposals that are being advanced by the Court right now I don't see those as antibundling --

**JUSTICE YOUNG:** They do contain antibundling principles.

**MS. JENSEN:** Well let me say this because I hadn't really thought about that issue, but the proposals as written go beyond that; far beyond that. They take away --

**JUSTICE YOUNG:** Let me just, let me just ask you the direct question. Do you think if one is within the Court's power to restrict the judges of this state from bundling for purposes of settlement and otherwise cases that are characterized as cancer cases and noncancer cases?

**MS. JENSEN:** To be honest, Justice Young, I had not really thought through that issue.

**JUSTICE YOUNG:** Do you -- well let me ask the more philosophical question. Do you think that it offends any notion of fairness to preclude one case

from being used as leverage – one plaintiff's case being used to leverage settlement of another plaintiff's case?

**MS. JENSEN:** I mean, I think that's essentially the same question.

**JUSTICE YOUNG:** You have no position then on whether that's a legitimate strategy?

**MS. JENSEN:** Honestly, I haven't really – I haven't thought it through, but --

**JUSTICE YOUNG:** Do you practice in this area?

**MS. JENSEN:** Yes, your honor, I do. I mean I am starting to, I mean I'm starting to think about it because it's just been raised, but I don't know what the answer to that is. I mean --

**JUSTICE YOUNG:** You have no feeling as a practicing attorney about the propriety of leveraging one plaintiff's case to cause the settlement in another case.

**MS. JENSEN:** Well my initial reaction is that it doesn't – it does sound like something that the Court may consider doing.

**JUSTICE YOUNG:** Well it's a frank issue because Judge Colombo when he met with us said that's how he uses the – he uses the leverage of serious cases to settle the nonserious.

**MS. JENSEN:** Right.

**JUSTICE KELLY:** Well you were being pressed to respond to something you indicate to us you haven't thought about, right? I think what I'd like to hear is what is your testimony with regard to that about which you have thought?

**MS. JENSEN:** Well the proposals, at least as written right now, go beyond the issue of bundling or not bundling. I mean, it – they're preventing cases from getting to trial. And that really was my concern and to follow up on what Mr. Gleason was saying, I think his concern – because the proposals as written create artificial standards that prohibit people who really have an injury but maybe don't technically qualify for getting their case up to trial that is impinging on the right to trial by jury which I've always felt was a very fundamental, important right. My father was an attorney before me. I got into the law because of his love and his passion for the law, and the right to trial by jury is fundamental (inaudible) of our

system of justice that I think is so important, and I don't think those rights should be taken away lightly. And in response to your questions, Justice Young, I mean I don't think anybody should have an unfair advantage in the litigation. That's not our intent.

**JUSTICE MARKMAN:** Ms. Gleason? Ms. Jensen, I'm sorry. I apologize. Ms. Jensen could you give me one illustration, one concrete illustration, of somebody who in your judgment and I think I'm using your terms has suffered a real injury but technically, I think that was your word technically, wouldn't qualify as such. Please give me an illustration.

**MS. JENSEN:** Sure. In – there was a – I'm not a doctor either, but in representing people like this and looking at these criteria, for example, the standard that the Court is using requires a quality one chest x-ray. Very frequently we don't see quality one x-rays, we see quality two or quality three, and that's a judgment by the B-reader in the first place as to what the quality is. And I don't know, sometimes if a client's particularly heavy whether they have trouble getting a quality one chest x-ray or whatever, but someone could have a quality two chest x-ray, which is diagnostic, which within the standard of care a doctor who's a pulmonologist would consider adequate for his own purposes in diagnosing asbestosis, but technically he would not qualify under this proposal.

**JUSTICE MARKMAN:** And why again would that person not get a level one x-ray?

**MS. JENSEN:** Once again, I'm not a doctor, I don't – I just know that we don't always see the quality one x-ray, and I know that doctors use quality two commonly. Another example might be, for example, someone who under the American Thoracic Standards they might use a different standard than what the court uses to diagnose asbestosis. And, for example, just even taking the pulmonary function studies here, although someone wouldn't technically qualify under this standard if, for example, they had a total lung capacity of 81%, that's 1% above normal, I mean is that – you know, how fair is that for somebody who's 1% above normal versus somebody who's 79%. I mean it's drawing an artificial line and that person could still have shortness of breath, still have scarring of the lungs that's irreversible and to me that person should be given their opportunity – their day in court. And that's one other thing that I want to say. I haven't tried a lot of cases in my career, I've tried some cases. I've lost cases. I've always respected the jury and the jury's verdict. And I've had clients even where I've lost the case come to me and thank me and say you know what I had my day in court. Just the fact that people could be heard and have their day in court is so important to our system of justice and the public, I think, and their respect of the law to know they can go to court and have their case heard.

**JUSTICE MARKMAN:** Wouldn't they have their day – let me focus specifically on alternative B. Wouldn't they have their day in court if they wanted their day in court?

**MS. JENSEN:** I don't think so and I think the reason – as we – as I understand proposal B, if you have, for example, let's say you've got 2,000 cases pending in the state of Michigan. And typically Judge Colombo, you know, schedule's them maybe two years in advance. And let's say that, you know, he schedules 600 malignancies or tier 1 cases in the first year and that's – maybe that's the universe of tier 1 cases – I'm making up numbers but let's say that's what it is. And then he schedules 600 tier 2 cases, say for the following year. So in 1997, he's got 600 tier 1 cases and he sets the tier 2 cases for 2008. We start working on our cases about a year out to get the medicals to the defendants, to take depositions, to exchange interrogatories. So now these cases are set. At the end of 2007, someone could come along and file one tier 1 case, as I'm reading proposal B, that case has to be resolved before these other 600 trial-ready cases could come up for trial if I'm reading that correctly.

**JUSTICE MARKMAN:** So it's not that you're not getting your day in court, you just object to the idea that the people who already have these symptoms manifest and have suffered from the illness are getting their day in court before the people who've not had those things manifested.

**MS. JENSEN:** Well that's not exactly right. I think Mr. Krause made this point in his own brief that in reality the tier 1 cases will always push back the tier 2 cases. And then once again, I would simply say to the Court that when the Court is making decisions about which technically – which cases should go forth first and which cases should go forth last, if at all, that that's a policy judgment that should be made by the Legislature. And that would be my second point about proposal B.

**CHIEF JUSTICE TAYLOR:** Thank you, Ms. Jensen.

**MS. JENSEN:** Thank you very much.

**CHIEF JUSTICE TAYLOR:** Robert Krause.

**MR. KRAUSE:** May it please the Court. We've been told once again that there's no crisis in Michigan. In 1999, the Wayne County Circuit Court backlog of asbestos cases was 550. By 2002, it had tripled to 1,500. Since 2002, on average, there've been 1,000 new cases filed each year. The backlog is now over 2,500 cases. There is, indeed, a crisis. We have filed a brief in which we have indicated

to the Court that we favor alternacy of A of the administrative orders. I think the main reason we favor we favor it is that it's met the test of time.

**JUSTICE KELLY:** Who is "we," sir?

**MR. KRAUSE:** Pardon?

**JUSTICE KELLY:** Who is "we?"

**MR. KRAUSE:** The petitioners, the original petitioners, your honor.

**JUSTICE KELLY:** Okay.

**MR. KRAUSE:** Yes. The courts in New York City, in Boston, in Cook County, in Madison County, all of those courts have enacted inactive dockets. They're working very well. They're cleaning up the backlog of serious cases, and we believe that the alternative A is very simple to administer. It's met the test of time in a number of other jurisdictions, and we believe that alternative A is the better choice.

**JUSTICE CORRIGAN:** Mr. Krause, can you deal with alternative B and what you see would be the obstacles if the Court were to vote for alternative B? What would be the problems of B?

**MR. KRAUSE:** I think, and I agree with Ms. Jensen. The – As I read alternative B, if there is one tier 1 case pending, tier 2 cases cannot be disposed of. So that means that if you have cleaned up all the tier 1 cases and then you're starting to work on the tier 2, if somebody files a cancer case, that stops all the tier 2 cases.

**JUSTICE CORRIGAN:** Let's say on the criminal side, you know, we have a preference for jailers versus bailers, and I think of what we're doing here as not too different from that because we try to have jail cases tried – people who are in the Wayne County jail, for example, before people on bail. So the more serious cases are tried before the bail cases, but still there's a combination on that docket so bail cases are being tried with the jailers. When you look at the asbestos docket and you say the cancer cases versus the noncancer diagnosis, how would you reword proposal B so as to make sure that the – that you were accommodating tier 2 cases?

**MR. KRAUSE:** I'd like it reworded like --

**CHIEF JUSTICE TAYLOR:** Sir, you have to stand in front of the microphone.

**MR. KRAUSE:** I'm sorry. I would frankly reword it like alternative A because I think alternative A is very simple. It doesn't have this ambiguity. It doesn't present the possibility that if somebody progresses into a tier 1 case, they nonetheless couldn't transfer until all the tier 1 cases had been disposed of which I think if a literal reading of alternative B would present that problem.

**JUSTICE YOUNG:** I think the point is if what we're trying to accommodate is prioritization, so that the more serious cancer cases get preferentially tried without perhaps absolutely precluding any tier 2 case or the noncancer case from being tried, is that an offense against any principle that you think is important in this effort to provide some priority?

**MR. KRAUSE:** I think there's some unfairness, and that's why we have indicated we think alternative A is the easier to administer --

**JUSTICE YOUNG:** It maybe easier, but it absolutely precludes anyone with a noncancer case from progressing to trial.

**MR. KRAUSE:** I think that could effectively, as we've indicated in our brief, preclude a tier 2 case from ever transferring into tier 1 (inaudible) --

**JUSTICE YOUNG:** I understand the point you're making about the mechanics of tier -- of proposal B. But, I mean, that's a technical problem that can be easily fixed in proposal B. Is there some reason why expressing a priority so that the -- wherever these cases are pending, the cancer cases get tried as a priority?

**MR. KRAUSE:** No, none whatsoever.

**JUSTICE MARKMAN:** Do you not also see that a court that -- a court might be reasonably concerned about the criticism that by pursuing alternative A the court is breaching the division -- the line between the legislative responsibility and the judicial responsibility - and that alternative B is more compatible with the idea of exercising the judicial responsibility because it's focusing on priority as opposed to putting a class of cases entirely outside the active docket? Do you not think that that might be a reasonable concern that a court might choose to think about?

**MR. KRAUSE:** I really don't -- I don't, your honor, because I think both alternative A and alternative B prioritize. I think they do it a little bit differently,

and I do see some unfairness to a plaintiff that is a tier 2 case when it starts, turns into a tier 1 case, and can't get transferred because there are still tier 1 cases that have not been resolved. And it could affectively preclude a person who starts out in tier 2 from every getting their day in court.

**JUSTICE MARKMAN:** I guess I don't understand alternative B to read that. I think alternative B maybe it ought to be made more clear and you raise a good point, but I think it's implicit in alternative B that if a tier 2 case evolves over time into a tier 1 case, that clearly it's placed in tier 1 and it does not remain in tier 2.

**MR. KRAUSE:** I think that would help the situation, yes.

**CHIEF JUSTICE TAYLOR:** Thank you, Mr. Krause.

**JUSTICE WEAVER:** Mr. Krause, before you leave. It wasn't clear to me who you are and who you represent as you keep saying "we." And you said it was some people who initiated this or something. Would you identify you know for the record who you are?

**MR. KRAUSE:** I represent a group of sixty-seven defendants in Michigan litigation. They were all named in our original petition, and I indicated in the brief that we filed, Monday I believe, that this brief, the second brief, was filed on behalf of the same defendants in Michigan litigation with two exceptions. One new one; one opted out.

**JUSTICE WEAVER:** You represent them? You are the attorney for them.

**MR. KRAUSE:** Yes, Ma'am.

**JUSTICE WEAVER:** Thank you so much.

**JUSTICE MARKMAN:** Can I ask you one more question, Mr. Krause? What is your view about consolidation? How important is that to either alternative A or B in your judgment?

**MR. KRAUSE:** I think it's very important.

**JUSTICE MARKMAN:** Can you explain why?

**MR. KRAUSE:** When you have nonserious cases, let's take 100 cases that are up for trial in Wayne County every other month. Typically ninety to ninety-

five of those cases are noncancerous, nonserious impairment cases. The plaintiffs take the position that they won't settle the serious cases unless the defendants agree also to settle the nonserious cases. So we really have no choice but to settle the --

**CHIEF JUSTICE TAYLOR:** Mr. Krause, can I ask you to stay close to the microphone.

**MR. KRAUSE:** I'm sorry.

**JUSTICE MARKMAN:** I don't think I was clear enough in my question. You're talking about bundling and I think that's very important, but I was talking about the idea of consolidating these cases in the one circuit.

**MR. KRAUSE:** I think that's an excellent idea. I think all of the defense lawyers and probably most of the plaintiffs would agree to consolidate all of the cases in one circuit court.

**JUSTICE MARKMAN:** Well I understand that maybe that consensus, but why is it a good idea?

**MR. KRAUSE:** Because Judge Colombo, I think, is the most experienced asbestos judge in the state. He knows these cases. He's tried these cases. He's got a master order in effect that everybody is very familiar with. When you go out of county, many counties have not adopted that master order and so you have a different set of procedures in place. I think it makes good sense -- most of the lawyers are in Wayne County or Oakland or thereabouts anyway, it would be very convenient I think.

**CHIEF JUSTICE TAYLOR:** Thank you, sir. Neal MacCallum.

**MR. MacCALLUM:** Good morning. My name is Neal MacCallum and I represent -- I'm from the firm of Collins, Einhorn, Farrell & Ulanoff, and we represent defendants in the asbestos cases. Justice Markman, your question to Mr. Krause is exactly what I wanted to speak about today, and that was consolidating the cases in one jurisdiction. At present, we have about 2,400 cases in Michigan. Ninety percent of them are in Wayne County. The other ten percent are scattered from Alpena, to Berrien, to Calhoun, Livingston, points in between, various numbers. Nearly everyone of these jurisdictions has adopted in one form or another by stipulation of counsel and order of the court, a case management order that's modeled after Wayne County. We are trying to process those cases, administer those cases, and bring those cases to trial in a like manner. By moving these cases to Wayne County for the purposes of processing through discovery and

through settlement, it would then enable all cases to proceed in a much more orderly fashion. And it would not deny any of the plaintiffs their opportunity to proceed, whether we're talking about proposal A, proposal B, or some alternative.

**JUSTICE CORRIGAN:** Mr. MacCallum, are you aware of whether there are objectors to the consolidation idea around the state?

**MR. MacCALLUM:** I am not aware of any objection to that. I did speak with Mr. Bedortha and he did express a concern that he thought it might be better to leave it up to the local courts to decide whether or not it should be consolidated, but beyond that we have been following the same type of order and I believe that it makes it much more simple for everyone involved, including the plaintiffs and the defendants, to have it coordinated.

**JUSTICE CORRIGAN:** And you support that even if bundling so-called bundling is retained by Judge Colombo in the management of the docket?

**MR. MacCALLUM:** Yes.

**JUSTICE CORRIGAN:** Okay.

**JUSTICE YOUNG:** What is your position on bundling?

**MR. MacCALLUM:** I hear that term, and it's not a term that I've use --

**JUSTICE YOUNG:** Let me define it for you again.

**MR. MacCALLUM:** Sure.

**JUSTICE YOUNG:** It's using the leverage of a cancer case to compel settlements of noncancer cases.

**MR. MacCALLUM:** I know that that's what is the term, it's not a method that my client or I have used in the approaching and solving of these cases.

**JUSTICE YOUNG:** I didn't mean - It's the one that Colombo says he uses.

**MR. MacCALLUM:** Mr. -- Judge Colombo does that. He --

**JUSTICE YOUNG:** And what is your position on that?

**MR. MacCALLUM:** In the abstract, I don't believe that that's fair. I don't believe that it's fair to the parties involved, the plaintiff or defendant. I know that I don't approach it nor my clients approach that because we look at each case individually whether you have twenty cases.

**JUSTICE YOUNG:** Not if the judge uses the technique of bundling.

**MR. MacCALLUM:** He uses the technique of --

**JUSTICE YOUNG:** I said he does.

**MR. MacCALLUM:** Yes.

**JUSTICE YOUNG:** He indicated that that was his primary leverage for settlement.

**MR. MacCALLUM:** He does. He does, but that has not come up in my settlement discussions with Mr. Bedortha or Mr. Serling, because we look at the cases individually.

**JUSTICE YOUNG:** Could you just answer the question directly? Do you think it's something that should be allowed, prohibited?

**MR. MacCALLUM:** I'm sorry, I thought I was clear. No, I don't think it's fair. I don't think it should be allowed, no. But that's not the way I approach it.

**JUSTICE MARKMAN:** But we're, of course, making policy not just for your relationship with other counsel, but for all counsel --

**MR. MacCALLUM:** Yes.

**JUSTICE MARKMAN:** in their relationships with all other counsel. And I think Justice Young was trying to understand what kind of policy you think this Court should administer in this area, if any.

**MR. MacCALLUM:** When you're talking about bundling, Judge Colombo has something in mind to move the cases along and to reach a resolution. He sees that he is accomplishing it in the way that he is doing this.

**JUSTICE YOUNG:** He's docket clearing, yes. It's a very effective tool I suspect.

**MR. MacCALLUM:** It's effective in the way that he sees it being done. In other jurisdictions with other plaintiffs – with other courts where there aren't that docket, we are still getting the cases resolved. So I don't know if bundling is truly the result of this happening – of getting the result.

**JUSTICE YOUNG:** Okay.

**CHIEF JUSTICE TAYLOR:** Thank you very much, sir. Victor Schwartz.

**MR. SCHWARTZ:** Good morning. I'm Victor Schwartz, I'm representing the Coalition for Asbestos Justice. It's a privilege to appear before this honorable Court, one of the great courts in this nation. I'll just talk a little bit about – very briefly about tort law. This Court and there've been other decisions, would have the power to rule in tort law that somebody who is not injured under criteria does not deserve a claim at all. A number of courts have done that. Tort law has to set priorities, and throughout the law of torts there's situations where one person could say somebody's injured, but the law doesn't recognize a claim. That's as true if somebody bumps you on a bus as it is with certain kinds of things that would be technical trespasses and it can be true here because there's reasons of policy to set priorities. There's a limited amount of assets and who is going to get them. And a court could decide under tort law that the persons who should get them are those who are defined as really sick and really ill.

**JUSTICE YOUNG:** Unfortunately, that maybe true, but this is an administrative – this is our legislative power that we're exercising over procedure.

**MR. SCHWARTZ:** Well you have full power under Article 6 of the Constitution of this state to set forth priorities just like you have in both alternative A and B. What I'm suggesting is that you have even more power under tort law. You could hold that these claims don't exist at all, and other courts have done that. And with respect to what you have done virtually, and we have an article that we submitted and cited in our brief, virtually every court that has done that and set forth something like akin to our alternative A has stuck with it. Not one place in the United States not in Boston, not in Madison County, have they repealed what they have done and they have been fully empowered to do it just like this Court is empowered to do it if you think it's the right thing to do. And that is to set priorities between impaired and unimpaired. Now other people here will debate as to whether the criteria are perfect or not perfect, I don't think any criteria are perfect, but you have to set forth some rule to say that people who are very sick should go to the front of the line they may die tomorrow. As compared to people who are unimpaired and in the visual they can function as well as you or I can. They can do anything we do. There's no visual appearance that's changed. One

would never know that these folks are ill. I think alternative A works better although I think this is a judgment this Court obviously has to make because it has been in practice for over twenty years and it's worked. So this is a pragmatic view of what the priorities are. It also avoids needless depositions, interrogatories, and things that can turn up expenses where there is no need for them.

**JUSTICE CORRIGAN:** What about --

**MR. SCHWARTZ:** I see the red little light blinking so I close my presentation.

**JUSTICE CORRIGAN:** Can I just ask one question?

**MR. SCHWARTZ:** You certainly may.

**JUSTICE CORRIGAN:** What about Justice Markman's point that proposal B is more consistent with the judicial authority that we enjoy versus the legislative power? What's your comment on his concern?

**MR. SCHWARTZ:** Well Justice Markman who is sensitive to the division of powers in all of his writings has a point that this is less of a work by the Court of line drawing, but you do have -- it's a question -- I think you have the power to do either one. So some people may not want to use all the power that's available to them, but I think the power is clearly there under Article 6.

**CHIEF JUSTICE TAYLOR:** Thank you, Mr. Schwartz.

**MR. SCHWARTZ:** Thank you.

**CHIEF JUSTICE TAYLOR:** Michael Doran.

**MR. DORAN:** Good morning, may it please the Court. My name is Michael Doran. I'm an attorney representing railroad workers. And I'm here to talk to you a little bit about the bills and how it applies towards my clients, approximately 100 railroaders throughout the state of Michigan. I presently have in suit cases in Calhoun County, in Wayne County, in Port Huron under the Federal Employees Liability Act. I also represented railroad workers extensively in the state of Ohio, and I argued -- and when the criteria bill was passed in Ohio, I argued in front of Judge Hannah that it should not be applicable to railroad workers. And simply put, the railroad workers do not have worker's compensation. This is their sole remedy. This is not a third-party action it's their direct action for their employer's misconduct over the years. And the evidence is compelling that these railroads knew for almost seventy and eighty years that

exposure to asbestos can and will cause asbestosis and other related diseases. When the Ohio bill passed the – I had a case pending so we had to argue this motion right away. And I've attached Judge Hannah's opinion and the – what I'm afraid – what I want to make sure happens in this bill and obviously I should be talking to the Legislature not just the Supreme Court, is that the FELA is carved out and excluded. As set forth in papers that I have submitted, it is the – and as Judge Hannah has wrote, and I just want to read briefly "The FELA has conferred upon railroad employees a substantive right to any damages suffered as a result of occupational injuries occurred through the negligence of the railroad." They cite *Urie*, which is a U.S. Supreme Court case. This may include (inaudible) --

**CHIEF JUSTICE TAYLOR:** Mr. Doran, can I ask you a question? How big a slice of the 2,400 cases are FELA cases?

**MR. DORAN:** I represent approximately 100, sir.

**CHIEF JUSTICE TAYLOR:** So there are 100 out of the 2,400?

**MR. DORAN:** I didn't know there was 2,400, but I represent approximately 100 plaintiffs.

**CHIEF JUSTICE TAYLOR:** Well whatever we've been told, 2,400 to 2,500.

**MR. DORAN:** Yes, and I practice extensively – I have almost 1,000 cases I've handled in Cleveland. And we are getting through that docket just fine. And I've got a case starting, an asbestos trial starting on Tuesday there, and we get those cases resolved. So, in any event, what my – what I want to make – my point here is that this criteria bill mirrors the Ohio criteria bill. And I want to --

**CHIEF JUSTICE TAYLOR:** Are you talking about proposal A and B, or are you talking about what's going on over the Legislature?

**MR. DORAN:** All of it. I mean --

**CHIEF JUSTICE TAYLOR:** I mean what we've traditionally called – we have is a bill, I just don't want to get confused.

**MR. DORAN:** Well I guess what's going on at the Legislature, sir.

**CHIEF JUSTICE TAYLOR:** Okay. What about A and B?

**MR. DORAN:** A and B look very similar to what was proposed in Ohio. And, in fact, the Ohio case has been – or Judge Hannah's ruling has been affirmed in this *Bogle* (phonetic) decision which I have submitted to the Court which is pretty clear and – saying that FELA is separate and apart and anyone that has a claim under that that is a remedy.

**CHIEF JUSTICE TAYLOR:** Are these FELA cases bundled?

**MR. DORAN:** They are not bundled. No, as a matter of fact, quite to the contrary --

**CHIEF JUSTICE TAYLOR:** So you're asking them to be treated as a normal tort case?

**MR. DORAN:** Every case I have, I just was on trial for – in Jude Kingsley in Calhoun County with five cancer cases and he set forth that we're going to do two different juries in one room at the same time and those cases were resolved. And I've had a bunch of asbestotic claims that were unresolved. So it has not worked that way at all. And I can't speak to the bundling. What I would like to just say though is that in closing, is that this is what Judge Hannah, his last sentence he says "The Ohio statute establishing its own injury criteria for plaintiffs claiming exposure to asbestos, must be subordinated to well established federal law. Simply put, it could not be clearer that states, Ohio included, may not legislate in areas so dominated by existing federal law. The application of the Ohio statute as to the instant case is preempted by the (inaudible) body of the federal law." So I'm here on behalf – speaking on behalf of all the railroad workers in the state of Michigan that have been exposed, that had asbestosis, that they should be specifically excluded. I predict that if this – because in your bill if you read the language – just one quick second you say in alternative A "This order applies to all asbestos related" and then it says "regardless of the theory of recovery." And I think if those – that should be clarified to specifically exclude the Federal Employers Liability Act. (Inaudible.)

**CHIEF JUSTICE TAYLOR:** Thank you.

**MR. DORAN:** Thank you.

**JUSTICE KELLY:** I have a question.

**MR. DORAN:** Sure.

**JUSTICE KELLY:** Sir, I understand that Congress is considering now a bill to reform asbestos litigation, are you familiar with it at all?

**MR. DORAN:** I'm very familiar with it.

**JUSTICE KELLY:** Is it – do you happen to know its status at the present time?

**MR. DORAN:** I think it is quite dead right now.

**JUSTICE KELLY:** Okay.

**CHIEF JUSTICE TAYLOR:** Thank you, Mr. Doran. Dr. Rosenman.

**DR. ROSENMAN:** Thank you for the opportunity. I wish to speak in opposition to both alternatives of the administrative rule. My name is Kenneth Rosenman. I'm a licensed physician in the state of Michigan. I'm a specialist in occupational environmental medicine. And I'm a Professor of Medicine at Michigan State University. I have been an expert and have examined patients for both plaintiffs and defendants in relation to asbestos, but I'm here on my own time today nobody is paying for my time. As part of my responsibilities at Michigan State University we, under contract to the state, track occupational disease in this state. And we've been doing this for the last eighteen years, and the number of people with asbestos related disease is approximately 800 to 5,000 a year. It's varied over the year. The number of people being hospitalized with asbestos related disease is actually going up – 120 back in '91 is up to 400 a year. And my concern is what I hear the Court defining as serious is in direct contrary (inaudible) objection to what the medical community defines as serious and why – how people are being admitted to the hospital with this condition. And so just some examples, the proposed regulations use part of the AMA guidelines when looking at pulmonary function tests, but exclude provisions on diffusing capacity and obstructive lung disease. The proposed rule excludes the use of high resolution CT scan which is routinely used in the practice of medicine. It requires a grading of asbestos pathology that no pathologist in the state uses.

**JUSTICE YOUNG:** Is it fair to say that your objection goes to medical criteria in the rule?

**DR. ROSENMAN:** Yes.

**JUSTICE YOUNG:** Does it go to anything beyond that?

**DR. ROSENMAN:** No, that would be --

**JUSTICE YOUNG:** Do you – are you aware of any published and widely accepted standards that are different from the ABA standards that could be used to make a line drawing for purposes - You realize, of course, doctors, I live with one, the intersection between medicine and law is not a happy one—except in my household. Doctors see a continuum; we make line drawing. So let's start with that as a basic premise. You have a different professional obligation than we do. We've got to make a line drawing.

**DR. ROSENMAN:** Right.

**JUSTICE YOUNG:** If we have to make a line drawing to establish priorities between those cases that involve the sickest of persons who've been exposed to asbestos and those who are less seriously affected, are there a set of criteria that you're aware of, other than the ABA standards that are widely accepted that we could refer to?

**DR. ROSENMAN:** Yes, there are.

**JUSTICE YOUNG:** All right, and what would those be? Did you submit them?

**DR. ROSENMAN:** I did submit them; they're in the published literature. The ABA criteria came out in 2003. The American Thoracic Society issued guidelines in September 2004. And I'd be happy to provide the reference to your clerk or to yourself. And I think - I understand —

**JUSTICE YOUNG:** You believe that we've received some references to The American Thoracic Society's criteria for diagnosis and treatment of nonmalignant asbestos diseases.

**DR. ROSENMAN:** Yes. That is --

**JUSTICE YOUNG:** Is that to which you refer?

**DR. ROSENMAN:** Yes, dated 2004. And I understand the point about the line, but the line that is now drawn in these regulations would say that people admitted to Michigan hospitals with the diagnosis of asbestosis do not qualify as serious or in your tier 2. And to me that is not – I don't consider that – I understand you know that is more than a continuum. I mean that is a serious condition. So to just end – you know actually if you look at it and I understand the concern about the Court you know the number of cases, but there are approximately 2,200, well it's not approximately there's 2,200 people a year being diagnosed with asbestosis in this state. And the vast majority of them never file

any suit. And so as a medical professional and public health professional, I'm concerned about what other barriers are out there. I mean there are a 120 --

**JUSTICE YOUNG:** Do you believe that litigation is an aid to health

**DR. ROSENMAN:** Well I believe --

**JUSTICE YOUNG:** and the medical profession?

**DR. ROSENMAN:** since Medicare and Medicaid and private health insurance is now -- is currently paying for the hospitalization of people with asbestosis, for the people who develop mesothelioma. We have 120 people with -- who died from mesothelioma in the state each year. It's not being covered by worker's comp. It's so -- and so these people -- you know there are serious, obviously death and serious economic consequences and I think financial issues are very important. And I think there are barriers out there and I think that this rule would increase the number of barriers and doesn't from a public health perspective address what I see as the true problem.

**JUSTICE CORRIGAN:** Doctor, you object to the proposals that are here pending in Michigan. And as I understand it some of what is being advocated in these proposals tracks what has occurred on other dockets in other parts of the country, e.g., Madison County, or Cook County, or Boston, or they're some similarities. Are you of the opinion that the docket orders that are entered in those states are also in error?

**DR. ROSENMAN:** My understanding is that these dockets have used the ABA criteria.

**JUSTICE CORRIGAN:** So they're all out of whack as far as you're concerned.

**DR. ROSENMAN:** As far as I'm concerned, as even as far as I know one of the people who was on that panel, and as far as he's concerned --

**JUSTICE CORRIGAN:** Are the objections being made in those states as well? In other words -- no, yes?

**DR. ROSENMAN:** I don't know what's going on in those other states.

**JUSTICE CORRIGAN:** You don't know. Okay. Thank you.

**JUSTICE MARKMAN:** Dr. Rosenman, both alternative A and alternative B requires a condition to the filing of a claim dealing with a nonmalignant disease that a doctor – that there be filed at the same time a medical report and diagnosis. I guess I would take notice of the fact that there's been a great deal of controversy in other jurisdictions about medical doctors having much the same obligation performing 400 or 500 of these a day and on occasion being sanctioned by courts for having done that. Should we in this jurisdiction be concerned about such potential abuse and, if so, how would you suggest we deal with that sort of thing in either alternative A or alternative B? You're aware, no doubt, of this kind of abuse in other jurisdictions?

**DR. ROSENMAN:** Yes, I am. I mean I've read about it in the newspaper. I'm not aware that it's happening in Michigan, but certainly, you know the criteria for the diagnosis of asbestosis including history – I mean include provisions of what are in the proposed regulations. They include a history, they include pulmonary function tests, they include radiographic studies. In my understanding of what's happened you know with multiple cases in other jurisdictions is they haven't followed those criteria. They haven't used all those components. It's just – My concern is the components in these proposed regulations just are not the standard of medical care and cause the line to be well above serious. I did want to address because somebody had raised this issue of quality one, two, and three.

**JUSTICE MARKMAN:** But let me just follow-up on that for a moment. If this Court were concerned about the possibility of such abuse, are there any kind of prophylactic or precautionary provisions that we could put in there in order to minimize this possibility? Obviously we're not limited to responding to abuse, we're concerned about potential abuse. And we've seen illustrations of such abuse in other jurisdictions. I mean what would you do if you were in that situation?

**DR. ROSENMAN:** Well I would hope that the judge was knowledgeable enough --

**JUSTICE YOUNG:** Oh, come on.

**DR. ROSENMAN:** I guess I would hope that.

**JUSTICE YOUNG:** Do you expect a judge who went to law school rather than medical school to be knowledgeable about cancer and precancerous disease processes?

**DR. ROSENMAN:** Well I know my mentor who was Dr. Seilkop (phonetic) he used to actually put on seminars for justices on this issue. And --

**JUSTICE YOUNG:** Really, you must be the only doctor I know who thinks that lawyers who wear robes are educable in medical disease processes.

**JUSTICE MARKMAN:** How many of these can a conscientious doctor do in say an eight hour day? And I don't profess to know and this is not a rhetorical question, but how many can a conscientious doctor do in a full day?

**DR. ROSENMAN:** A conscientious doctor could see one of these – I mean it depends how much of assistance – I mean the conscientious doctor doesn't do the pulmonary function test, they order the pulmonary function test. So there's a combination. The exam--twenty minutes, a half an hour. Compiling all the records that are done by other people, you know that – you know an hour I would think would be reasonable. I mean, you know, all that information brought, you know, to the doctor to review. But could I just address this issue of quality one, two, and three that was brought up? I mean it just seems so simple. Of course you want a high quality film. We're in the process – we've just completed a study of the University of Michigan where there were 1,800 radiographs read. And so these were films done, just done – just completed over this last year, only one-third of the films were quality one. Now, whatever bad things I have to say about the University of Michigan as being from State, they still know how to take x-rays. And yet here it is, tertiary care, two-thirds of them were quality two and three. I read x-rays for many of the occupational clinics in the state I rarely see a quality one x-ray. It's sort of just like another burden, additional costs, it's just another barrier and it doesn't draw the line in the right place.

**JUSTICE MARKMAN:** Well what do you think a defender of this kind of x-ray qualification would say in response to you? I mean you're not going to get a response from too many members of this Court, but what is the best response to your argument in your judgment? Let me ask you to argue the other side momentarily.

**DR. ROSENMAN:** To argue the other side is we – there always will be differences in interpretations of radiographs. But reasonable physicians will come to the same conclusion and it doesn't matter if it's quality one, two, or three. I mean, it's really – it's sort of a smokescreen. It really doesn't – If they're gonna differ, they're gonna differ. And there's quality one, two, and three which – these criteria were set up by the International Labor Organization. They're used internationally. They say quality one, two, and three are acceptable. And it's just a – it's like an additional barrier. Go get another x-ray before we'll look at you. And then you may not be able to find somebody who'll get you that x-ray.

**JUSTICE CORRIGAN:** Dr. Rosenman, a couple of questions. Have you submitted anything in writing to us on your views?

**DR. ROSENMAN:** I'd be happy to.

**JUSTICE CORRIGAN:** I would appreciate your comments on these. Second, do you support the notion that a court ought to prioritize between the people who are really diagnosed with asbestosis and those who have calcification or less serious cases? Or should they all just be commingled on the docket?

**DR. ROSENMAN:** I'll leave that for the Court. I'm concerned that the line you're drawing is an inappropriate line.

**JUSTICE CORRIGAN:** Okay.

**DR. ROSENMAN:** And how you want to prioritize – I guess my other concern is if you could address the barriers to people filing at all. How come – I think you get two or three mesothelioma cases a year. Where are the other 115? And how come they're not filing? What are the barriers to that? I mean from a public health point of view that's what I'm concerned about.

**JUSTICE YOUNG:** Probably malpractice.

**DR. ROSENMAN:** Excuse me?

**JUSTICE MARKMAN:** Well Dr. Rosenman?

**JUSTICE WEAVER:** Would you please be sure and include in your submission to us The American Thoracic Society (inaudible) as opposed to the ABA.

**DR. ROSENMAN:** Yes, I'd be happy to.

**JUSTICE WEAVER:** (Inaudible) make the reference.

**JUSTICE KELLY:** We have letters from Dr. Miller, Albert Miller, I believe, an M.D. from your society. Are you familiar with his letters to us?

**DR. ROSENMAN:** Yes, I know Dr. Miller. Yes, I have a letter dated May 22 that was shared with me that I was copied on.

**JUSTICE YOUNG:** I think he has a cite for that.

**DR. ROSENMAN:** And he actually does have a citation, the reference for that. He was on both committees. He was on the ABA committee and he was on The American Thoracic Society committee.

**JUSTICE MARKMAN:** Dr. Rosenman in your experience, your medical experience, what proportion of all individuals who alternative B would characterize as fitting within tier 2 would someday graduate as it were to tier 1? Would it be a high percentage or what would be the rough percentage in your judgment?

**DR. ROSENMAN:** Certainly somebody who – it's gonna be hard, I can't give you an absolute percentage. Let me, as I speak aloud I can come up with a range for you. If you look at the highest exposed groups of asbestos workers, approximately fifty percent of them end up with some asbestos related disease. And about twenty percent get a type of cancer. So the people who manifest the nonmalignant changes they are at increased risk of getting cancer in the future. And so it's gonna be above twenty percent. It's gonna be – no – but I don't know it's gonna be less than – it's gotta be less than fifty percent. It's gonna be somewhere in the twenty to fifty percent range.

**JUSTICE MARKMAN:** Thank you.

**CHIEF JUSTICE TAYLOR:** Thank you, sir.

**DR. ROSENMAN:** Thank you.

**ITEM 3: 2005-12 – MCR 5.104, 5.402, and 5.403**

**CHIEF JUSTICE TAYLOR:** Turning to Item 3, Terri Stangl.

**MS. STANGL:** May it please the Court, I'm speaking on ADM 2005-12, which was the guardianship rules that were published by the Court. I'm here on behalf of the State Bar which wishes to thank the Court for publishing these rules for comment because they do address concerns with the guardianship proceedings that we had brought to the Court's attention. After the rules were published, the Bar was contacted by the Michigan Probate Judges Association which raised some concerns with us for the first time about some of the approaches that were taken in the rules. We've had several discussions with those judges, and in those discussions have come up with some possible alternative approaches that maybe acceptable to both groups and those have been submitted in writing. What I'd like to speak about this morning is the areas where there is agreement between the proposed rule, and my understanding of what the discussions and the perspective of the judges are. The first point of agreement is that ex parte temporary

guardianship should be the exception not the rule. That there needs to be some finding of good cause or exceptional circumstances on the record before they're issued. This is not always the case throughout the state, but that's practice among the judges is where they make such finding before the order is issued. Second of all, we both agree that parents needs to have a clear and simple way to file an objection if a temporary ex parte guardianship is issued. In the proposed rule that process was through a hearing that would be automatically scheduled after fifty-six days. The probate judges have suggested a better course would be to have an order that stays in place until the parent files an objection and then there would be an expedited hearing after that. The Bar would find either approach an acceptable way provided that there's a system for the parent to know about and file a simple form to lodge that objection. But both of them give a quicker way for the parent to file that objection. The third area where we agree is that any rules that are published concerning the temporary ex parte guardianships should be contained in the section of the Court rules related to temporary guardianship. That makes sense to make sure it's clear that they relate to those proceedings only if that's what we're intending to cover. The fourth area is we both agree that parents should receive notice about the process, but this is an area where we differ about how that notice should be provided. The Bar and the proposed rules specify that parents that should receive actual notice through personal service if that's possible and, if not, then you can go to first class mail or publication.

**JUSTICE YOUNG:** Why personal service (inaudible) --

**MS. STANGL:** Because of their fundamental interests that is involved. You have parental rights that are involved, and what we have seen many --

**JUSTICE YOUNG:** Well we have fundamental rights in everything -- litigation, why then -- and mail service is considered sufficient --

**MS. STANGL:** Yeah, in fact, personal service under the Court rules that can include certified mail with a signed receipt. I mean that's --

**JUSTICE YOUNG:** Well is that really designed to get notice? In this modern world there are a lot of folks who avoid signing for mail.

**MS. STANGL:** Right. And that is why there's a tiered approach that if you can't get personal service you can go onto first class mail.

**JUSTICE YOUNG:** Well let me just ask the very practical question. In a world where people don't sign for mail or where they're busy or incarcerated as many of the parents are in these cases, does it make sense to impose other than the

service that has been recognized as sufficient to satisfy constitutional notice which is U.S. mail, regular mail?

**MS. STANGL:** When you're dealing with a parental interest with the children in a fairly short time period --

**JUSTICE YOUNG:** Why is mail, regular mail, not sufficient to protect the interest required by notice to parents?

**MS. STANGL:** The experience of practitioners that represent many low income families in these areas is that mail is not necessarily an affective way. You may have multiple adults in a household where the mail is not actually handed off to the right person. You may have somebody who's temporarily out of town because of work or health care reasons, and a child has been temporarily put with another relative for that short period of time. There needs to be an effort to track down that parent. It's not saying that that's the only way, but there should -- in the first instance be an effort to do that. In the incarceration setting the rules already say under the guardianship rules that service should be done in an institution by the warden or the person in charge of the institution or prison, so personal service is done by that person handing it to the prisoner. It can be accomplished in that way. So it's the practical reality that first class mail does not always get there and it does not take that much more effort to insure that a parent is aware that something concerning their children has occurred so that they can either attend a hearing or lodge an objection in a timely fashion. So attempting to make that first initial communication with them, if that doesn't work then, of course, you can go onto other forms of service.

**CHIEF JUSTICE TAYLOR:** Thank you, Ma'am.

**JUSTICE KELLY:** You sent us comments dated May 24, and you included this as one of your points and you included three others -- temporary guardianship expiration date, proof of service and ex parte guardianship proceedings, and good cause on the record. So if we read those over carefully, will we have the rest of your statement?

**MS. STANGL:** Yes, I would just make my point if either the published rules or the ones that were submitted are acceptable to the Bar, the new version is an attempt to accommodate concerns that were raised by the probate judges other than the personal service issue.

**CHIEF JUSTICE TAYLOR:** Thank you, Ma'am. We will stand in recess.